

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Applica-)	Application No. P-0006
tion of Aquila, Inc. seeking)	
resolution of a dispute under)	GRANTED
Nebraska Revised Statute)	
Section 57-1306.)	Entered: November 13, 2003

BY THE COMMISSION:

P R O C E D U R A L H I S T O R Y

On May 9, 2003, Aquila, Inc. (Aquila) filed an application with the Nebraska Public Service Commission (the Commission). In its application, Aquila requests that the Commission enter an order, pursuant to Neb. Rev. Stat. §§ 57-1301 to 57-1307 (2000 Supp.) and Title 291, Chapter 9 of the Nebraska Public Service Commission Pipeline Common Carriers Rules and Regulations, declaring that the Metropolitan Utilities District's (M.U.D.) mains located in Highway 50 south of Highway 370 and in Fairview Road from Highway 50 to 174th Street are in violation of Neb. Rev. Stat. §§ 57-1301 et seq., and that M.U.D. must cease and desist extension of the proposed natural gas mains. Aquila simultaneously filed a Motion for Cease and Desist Order and for an Expedited Hearing. Notice of the application was sent to M.U.D. via first-class mail on May 13, 2003.

A pre-hearing conference was held on May 14, 2003, and on May 16, 2003, the Commission issued a pre-hearing conference order. On May 20, 2003, M.U.D. filed a Resistance to Aquila's Motion for Cease and Desist Order, and on May 27, 2003, M.U.D. filed a Corrected Resistance to Aquila's Motion for Cease and Desist Order. M.U.D. asserted that the Commission has no jurisdiction to issue a cease and desist order under Neb. Rev. Stat. §§ 57-1301 to 57-1307 relating to the extension of a natural gas main to a TBS installed for the purpose of system enhancement and increased capacity, as opposed to a main extension installed to serve customers along the extension. (Corrected M.U.D. Resistance at ¶ 2). M.U.D. also argued that Aquila has no standing under Neb. Rev. Stat. §§ 57-1301 to 57-1307 to complain regarding the extension of a natural gas main, the purpose of which is to increase system reliability and system capacity where natural gas service to customers along such extension is not involved and neither party is attempting to serve a customer. (Corrected M.U.D. Resistance at ¶ 4).

A hearing was held on Aquila's Motion for Cease and Desist Order on May 29, 2003. On June 2, 2003, M.U.D. filed an answer

to this application. On June 3, 2003, the Commission entered an order denying Aquila's Motion for Cease and Desist Order.

On September 22, 2003, a hearing on this application was held in the Sarpy County Board of Commissioners Hearing Room, Sarpy County Courthouse, 1210 Golden Gate Drive, Papillion, Nebraska. The formal rules of evidence were not invoked. Attorneys Trenten P. Bausch and Megan Sebastian Wright appeared on behalf of Aquila. Attorneys Susan E. Prazan and Justin Cooper appeared on behalf of M.U.D. Each party presented their respective arguments on the issues, and the matter was submitted for decision by the Commission.

I N T R O D U C T I O N

Aquila asks the Commission to declare that M.U.D. mains in Highway 50 south of Prairie Corners to Fairview Road and in Fairview Road to 174th Street (approximately 5.5 total miles of main through undeveloped area) are not in the public interest. M.U.D. asserts that the mains are necessary to connect to a new town border station (TBS) at 174th and Fairview Road (the "174th and Fairview TBS"). M.U.D. states that the 174th and Fairview Road TBS is necessary to make up capacity lost as a result of a pressure reduction at the 84th and Center TBS and to reinforce the southwest portion of its service area. Aquila asserts that the 174th and Fairview Road TBS does not serve its asserted purpose and is, instead, simply for growth. Aquila further asserts that M.U.D. has fallen far short of meeting its burden of proof that the proposed mains are in the public interest.

J U R I S D I C T I O N A N D S T A N D I N G

Early on in this proceeding, M.U.D. took the position that the Commission did not have jurisdiction to address the mains at issue and Aquila did not have standing to challenge them because the mains were purportedly for system enhancement rather than growth. (Corrected M.U.D. Resistance at ¶ 2, ¶ 4). While M.U.D. has arguably waived its arguments by participating in the formal hearing on Aquila's Complaint, the arguments have never been formally withdrawn. The Commission thus feels compelled to address and state its disagreement with M.U.D.'s position.

First, the governing statutes, Neb. Rev. Stat. §§ 57-1301 to 57-1307, do not contain any express limitation on the Commission's authority to review natural gas main extensions. To the contrary, § 57-1303 specifically prohibits M.U.D. from "extend[ing] or enlarg[ing] its natural gas service area or . .

. its natural gas mains . . . unless it is in the public interest to do so." Section 57-1306 states, "If the investor-owned natural gas utility . . . disagrees with a determination by . . . a metropolitan utilities district that a proposed extension or enlargement is in the public interest, the matter may be submitted to the Public Service Commission for hearing and determination in the county where the extension or enlargement is proposed" The statute is not qualified in any manner to include only situations where service to customers is involved. Based on express statutory language, the Commission is comfortably within its jurisdiction in considering the mains at issue and Aquila is entitled to challenge the public interest of those mains.

Moreover, M.U.D.'s assertion that the natural gas main is for purposes of increased system reliability and system capacity rather than for service to customers is not supported by the testimony of its own witness, Denise Dolezal. Ms. Dolezal testified that the 174th and Fairview TBS is designed for growth of M.U.D.'s system to the south and west and to support that anticipated growth. (Tr. at 111:25-112:13). The 174th and Fairview TBS was modeled after the 175th and Center TBS for purposes of determining the capacity to request from Northern. The requested capacity was not tied to capacity supposedly "lost" as a result of volumes being reallocated from the 84th and Center TBS. Even under M.U.D.'s narrow interpretation of the Commission's authority and Aquila's standing, this proceeding is properly before the Commission because service to customers is very much at issue given the true purpose behind M.U.D.'s natural gas main extensions.

F A C T U A L B A C K G R O U N D

This case arises under the provisions of Neb. Rev. Stat. §§ 57-1301 et seq., generally referred to as LB 78, which went into effect August 28, 1999. (Stipulation at ¶ 1).

M.U.D. is a political subdivision of the State of Nebraska operating as a natural gas and water utility in the City of Omaha, Nebraska, and its environs, including Sarpy County. (Stipulation at ¶ 2).

Aquila operates as a natural gas utility in the eastern one-third of Nebraska, including Sarpy County. (Stipulation at ¶ 3).

In Application No. P-0004, the Commission considered whether M.U.D.'s mains in Highway 50 south of Prairie Corners to just south of Highway 370 were in the public interest. The Commission issued an Order in P-0004 finding that the mains in Highway 50 from Prairie Corners to south of Highway 370 were in the public interest. (Stipulation at ¶ 7). Aquila then filed a Motion for Rehearing in Application No. P-0004, asserting that the Commission erred in relying on the contribution of funds from Northern in its public interest analysis when there was no evidence of an agreement with Northern to relocate the 84th and Center TBS to 174th and Fairview Road, nor that M.U.D. had obtained the necessary regulatory and M.U.D. Board approval to relocate the 85th and Center TBS. (Ex. C to Stipulation at 1).

On July 16, 2002, the Commission issued its Order on Motion for Rehearing in Application No. P-0004, reversing its earlier finding that the mains installed in Highway 50 from Prairie Corners to just south of Highway 370 were in the public interest. (Stipulation at ¶ 8). M.U.D. then filed a Motion for Clarification, Reconsideration, or Rehearing. (Ex. D to Stipulation at 1). On August 13, 2002, the Commission issued an Order on M.U.D.'s Motion for Clarification, Reconsideration, or Rehearing in Application No. P-0004, stating, "At sometime in the future, M.U.D. might make a final determination on relocation of the town border station (TBS) within the parameters of Neb. Rev. Stat. § 57-1301 et seq., and might obtain the necessary approval for the relocation. If that relocation requires construction in Highway 50 south of Prairie Corners, such construction would not be prohibited by the Commission's order of July 16, 2002, in this docket" (Ex. D to Stipulation at 1).

On June 5, 2002, while the Commission was considering the post-hearing motions in Application No. P-0004, the M.U.D. Board of Directors approved the capital expenditures for extension of the natural gas mains in Highway 50 and Fairview Road to 174th Street and for the 174th and Fairview TBS at its Board Meeting. (Stipulation at ¶ 20). The estimated cost of the mains in Highway 50 and in Fairview Road from Highway to 174th Street is \$1,340,000. (Stipulation at ¶ 20). The estimated cost of the TBS is \$380,000. (Stipulation at ¶ 20). At the time the M.U.D. Board approved the natural gas mains for construction, M.U.D. and Northern were in negotiations regarding a contract dispute involving a contribution of funds from Northern to M.U.D. and that involved construction of a TBS for M.U.D. (Ex. 5 at 2).

The Northern/M.U.D. Agreements

In 1991, Northern and M.U.D. entered an agreement (the "1991 Agreement") providing M.U.D. a firm entitlement of 179,500 MMBtu per day in volumes. (Ex. F to Stipulation, Ex. 5, Tr. at 40:18-41:1). M.U.D. had a unilateral right to terminate the 1991 Agreement every five years. (Ex. 5, Tr. at 41:2-6). The agreement resulted in \$20 million in revenue to Northern every year. (Ex. 5, Tr. at 41:10-25). In 1996, at the time of M.U.D.'s first option to terminate the agreement, Northern, seeking to protect against an alleged competitive threat from Natural Gas Pipeline of America, agreed to an amendment (the "1996 Amendment") of the 1991 Agreement. (Ex. 5, Tr. at 42:1-8). Under paragraph 4 of the 1996 Amendment, Northern would (1) transfer ownership of the Omaha #2 Branchline (\$920,000 book value) to M.U.D. at zero cost to M.U.D., (2) contribute \$5 million to M.U.D. in 2001 upon FERC approval of the transfer of the Omaha #2 Branchline, and (3) relocate the 84th and Center TBS at a \$700,000 cost to Northern for demolition and new construction. (Ex. 5, Tr. at 42:9-43:14). Sometime between 1996 and the present, M.U.D.'s firm entitlement was increased to 189,500 MMBtu per day. (Tr. at 44:9-17).

Because Aquila is served by the Omaha #2 Branchline, FERC approval is required prior to Northern actually transferring the line to a third party. (Ex. 5, Tr. at 222:4-223:19). Due to service issues, Aquila refused to give its consent to the transfer of the Omaha #2 Branchline to M.U.D. (Stipulation at ¶ 15). Northern asserted that it had no obligation to transfer the \$5 million to M.U.D. because the payment was conditioned upon receipt of necessary regulatory approvals by Northern and M.U.D. (Ex. 5, Tr. at 60:20-61:15). M.U.D. asserted that the original intent of the \$5 million was in recognition of M.U.D.'s waiver of its termination rights under the contract, not as consideration for moving the 84th and Center TBS. (Ex. 5, Tr. at 44:3-25).

During the summer of 2002, the period during which the Application No. P-0004 hearing was held and when the Commission's orders were entered, the 1996 Amendment governed. (Ex. 15, Ex. 2). The negotiations regarding resolution of the contract dispute regarding the 1996 Amendment were ongoing during the summer of 2002. (Ex. 5 at 2).

In the fall of 2002, after the Commission's rulings in Application No. P-0004, M.U.D. and Northern agreed to settle the

contract dispute involving the 1996 Amendment (the "2002 Settlement") in a manner to bypass Aquila's consent and FERC approval. (Ex. 5, Ex. 2, Ex. 3). The 2002 Settlement was memorialized in two letter agreements. (Ex. 2, Ex. 3). The 2002 Settlement superseded paragraph 4 of the 1996 Amendment. (Ex. 2). Northern agreed to pay M.U.D. a \$4.35 million contribution in aid of construction (CIAC) for construction of facilities on its distribution system to assist in the development of natural gas facilities, and Northern would retain ownership of the Omaha #2 Branchline. (Ex. 5, Ex. 2, Tr. at 16-12). In the 2002 Settlement, M.U.D. agreed to realign 20,000 MMBtu per day away from the 84th and Center TBS, thus permitting Northern to reduce the pressure on the Omaha #2 Branchline. (Ex. 2, Tr. at 195:9-24). M.U.D. also agreed to support inclusion of the CIAC in Northern's rate case. (Stipulation at ¶ 18, Ex. 2, Tr. at 62:21-63:18). If the CIAC is ultimately included in Northern's rates, M.U.D.'s and Aquila's ratepayers will be required to reimburse Northern \$191,400 and \$522,000, respectively, through their rates. (Stipulation at ¶17, Tr. at 238:24-239:24). Other customers of Northern will pay the remainder. In addition, under the 2002 Settlement, Northern agreed to a \$500,000 cap for the cost of a new TBS for M.U.D. (an amount to be reimbursed to Northern from M.U.D.). (Ex. 5, Ex. 2, Tr. at 61:21-62:4).

Northern asserts that under the 2002 Settlement it is not required to make a filing with the Federal Energy Regulatory Commission (FERC) prior to the installation of the Fairview Road TBS. (Ex. 22). A filing with FERC would be required for abandonment of a TBS or for transfer of the Omaha #2 Branchline to M.U.D. (Tr. at 60:5-8, Stipulation at ¶ 13).

Under the 1996 Amendment, M.U.D. had been entitled to \$5.92 million in cash and assets, a \$500,000 TBS at no cost, and the \$200,000 dismantling of the 84th and Center TBS. (Ex. 5 at 3, Tr. at 42:14-43:14). Under the 2002 Settlement, M.U.D. received only \$4.35 million and has to pay Northern up to \$500,000 for a new TBS. (Ex. 2, Ex. 3). In exchange for giving up \$2.8 million in value, M.U.D. avoided FERC's approval. (Ex. 5 at 3, Tr. at 61:21-62:4, Tr. at 62:16-20). Specifically, M.U.D. and Northern avoided having to seek FERC approval regarding abandonment of the 84th and Center TBS and transfer of ownership of the Omaha #2 Branchline and thus any protest by Aquila in the FERC proceeding. (Ex. 5, Tr. at 62:16-20).

M.U.D. has received the funds from Northern pursuant to the 2002 Settlement. (Stipulation at ¶ 16).

M.U.D. receives 189,500 Dth/day in contract entitlement from Northern, both before and after the pressure reduction at the 84th and Center TBS. (Stipulation at ¶ 21).

Under the 2002 Settlement, M.U.D. will continue to take 59,587 MMBtu per day of natural gas from the 84th and Center TBS. (Stipulation at ¶ 19, Ex. 13 at 7). The 84th and Center TBS is a vital TBS from which M.U.D. will continue to take natural gas for the foreseeable future. (Tr. at 82:2-15).

In summary, the evolution of M.U.D.'s rights under the 1991, 1996, and 2002 M.U.D./Northern agreements is as follows:

1991 Agreement (Ex. F to Stipulation)	1996 Amendment (Ex. 15)	2002 Settlement (Ex. 2, Ex. 3)
1. Unilateral right of M.U.D. to terminate every five years	1. M.U.D. gives up termination right 2. Northern transfer of Omaha #2 Branchline to M.U.D. 3. Contribution of \$5 million to M.U.D. upon receipt of necessary regulatory approvals 4. Relocation of 84th and Center TBS 5. Northern to construct new TBS at cost of \$500,000 6. Northern to dismantle 84th and Center TBS at cost of \$200,000	1. Surrender of termination right not affected 2. No transfer of Omaha #2 Branchline 3. Reduction of \$5 million to \$4.35 million to M.U.D. as a CIAC 4. M.U.D. to continue to use 84th and Center TBS but to realign 20,000 to 30,000 MMBtu/day to other TBS's 5. M.U.D. to pay up to \$500,000 for the 174th and Fairview TBS 6. 84th and Center TBS to remain in service 7. M.U.D. to support inclusion of CIAC in Northern's rate case

The 174th and Fairview TBS

M.U.D. requested that the 174th and Fairview TBS be designed for a capacity of 32,000 MMBtu per day, because the 174th and Fairview TBS was modeled after the 175th and Center TBS. (Tr. at 56:13-24; 85:8-21). M.U.D. believes that the area around the 174th and Fairview TBS will ultimately be developed similarly to that around 175th and Center, including industrial, commercial, and residential development. (Tr. at 85:22-86:6;

87:2-10). M.U.D. was clearly sizing the 174th and Fairview TBS for future growth. (Tr. at 85:18-21, Tr. at 111:25-112:13).

Northern completed construction of the 174th and Fairview TBS in August 15, 2003. (Stipulation at ¶ 16).

Even though M.U.D. had the capability of modeling or performing engineering analysis regarding its 125 pound system, M.U.D. did not analyze or model whether 174th and Fairview was the best location for a new TBS or whether a TBS at 174th and Fairview would actually flow gas to the areas it defined as the "southwest portion" of its distribution system. (Tr. at 89:9-90:5, 91:17-92:2, Ex. 16, Ex. 19, Ex. 20, Tr. at 79:18-80:3, Tr. at 89:14-90:5, Tr. at 91:17-92:2, Tr. at 161:8-163:1). M.U.D. relied on "gut feel" as to how their system flowed and at least in part on a "wild guess" as to the proper size for the 174th and Fairview TBS. (Tr. at 79:18-80:3, Tr. at 89:14-90:5, Tr. at 91:17-92:2, Tr. at 161:8-163:1). The models M.U.D. constructed after the location of the 174th and Fairview TBS had been decided were not for the purpose of analyzing how or whether the 174th and Fairview TBS would flow gas into M.U.D.'s Omaha system but were instead various scenarios regarding M.U.D.'s "wish list" for future mains in Sarpy County. (Tr. at 93:11-96:14). Contrary to M.U.D.'s claims regarding system integrity, M.U.D.'s own data shows that it is physically impossible for meaningful volumes of natural gas from the 174th and Fairview TBS to flow to the areas M.U.D. identified as those to be served by the 174th and Fairview TBS given the current design of M.U.D.'s natural gas distribution system, even if no gas were delivered to the 84th and Center TBS. (Ex. 16, Ex. 19, Ex. 20, Tr. at 268:14-270:5).

Prior to the deposition of Rhonda Chantry in this proceeding (which took place long after the decision to place the TBS at 174th and Fairview was made), M.U.D. performed no economic feasibility analysis for the mains to connect to the 174th and Fairview TBS in Highway 50 south of Highway 370 and in Fairview Road from Highway 50 to 174th Street. (Ex. 13 at 6; Tr. at 22:10-16). In fact, Scott Keep of M.U.D. specifically directed Ms. Chantry not to include the mains at issue in her annual review. (Tr. at 21:18-22:9). At the hearing, Ms. Chantry testified that after her deposition, she performed a "ballpark" economic feasibility analysis regarding the mains, but she had no documentation or evidence regarding the analysis she performed. (Tr. at 33:3-18, Tr. at 35:3-37:4). The "ballpark" economic feasibility analysis performed by Ms. Chantry did not take into consideration the fact that M.U.D. would have to

repay to Northern up to \$500,000 for the cost of construction of the 174th and Fairview TBS. (Tr. at 38:1-17). That is, she used the wrong number. The only mains that were included in an economic feasibility review by M.U.D. were those at issue in Application No. P-0004, the mains in Highway 50 from south of Prairie Corners to Highway 370, which were included in M.U.D.'s annual review. (Stipulation at ¶ 22).

M.U.D. is subject to the provisions of Neb. Rev. Stat. § 14-2117, which states, "No metropolitan utilities district may extend or enlarge its service area unless it is economically feasible to do so. In determining whether or not to extend or enlarge its service area, the district shall take into account the cost of such extension or enlargement to its existing ratepayers."

O P I N I O N A N D F I N D I N G S

Before turning to the public interest analysis, it is important to clarify from the outset that this is not the same case as Application No. P-0004. The facts at issue in Application No. P-0004 have changed and, consequently, the conclusions drawn by the Commission in Application No. P-0004 cannot form the basis of the Commission's ruling in this proceeding. In its August 13, 2002 order, the Commission stated,

At sometime in the future, M.U.D. might make a final determination on relocation of the town border station (TBS) within the parameters of Neb. Rev. Stat. § 57-1301 et seq., and might obtain the necessary approval for the relocation. If that relocation requires construction in Highway 50 south of Prairie Corners, such construction would not be prohibited by the Commission's order of July 16, 2002, in this docket .

. . . .

(Ex. D to Stipulation at 1). Previously, in its July 16, 2002 order, the Commission had concluded that without the Northern contribution, M.U.D.'s mains in Highway 50 south of Prairie Corners were not economically feasible. (Ex. C to Stipulation). The Commission thus assumed four events would occur prior to any further attempt by M.U.D. to extend natural gas main in Highway 50: (1) relocation of the 84th and Center TBS, (2) contribution of funds from Northern, (3) regulatory approval, and (4) an analysis, by M.U.D., of the public interest criteria.

(1) *Relocation of the 84th and Center TBS.* The much-discussed abandonment and relocation of the 84th and Center TBS did not come to pass. The governing 1996 Amendment between M.U.D. and Northern at the time of the Application No. P-0004 hearing and orders provided that M.U.D. would take ownership of Northern's Omaha #2 Branchline and that the 84th and Center TBS would be abandoned. (Ex. 15 at ¶ 4). In October 2002, after the final order was entered in Application No. P-0004, M.U.D. and Northern entered into the 2002 Settlement that superseded the applicable provisions of the 1996 Amendment. (Ex. 2, Ex. 3). Under the 2002 Settlement, M.U.D. continues to be entitled to approximately 60,000 MMBtu of natural gas per day (approximately 75% of its previous entitlement) at the 84th and Center TBS. (Tr. at 49:7-16).

(2) *Contribution of Funds from Northern* and (3) *Regulatory Approval.* After the Commission's August order in Application No. P-0004, under the 2002 Settlement, M.U.D. agreed to accept significantly less consideration from Northern than M.U.D. asserted it was contractually entitled to under the 1996 Amendment. (Ex. 2, Ex. 3, Ex. 5). As explained above, M.U.D. sacrificed \$2.8 million in value to avoid FERC approval tied to the transfer of ownership to M.U.D. of Northern's Omaha #2 Branchline and abandonment of the 84th and Center TBS. See *supra* at 6-9. M.U.D. appears to have attempted to circumvent, rather than satisfy, the Commission's second and third requirements.

(4) *Analysis of the Public Interest Criteria.* While the Commission expected M.U.D. to perform the statutorily required public interest analysis prior to commencing any natural gas main extensions in Highway 50 and in Fairview Road (as M.U.D. must do prior to commencing any natural gas main extension) the record is clear that no such analysis was performed.

Public Interest Analysis

This application requires the Commission to apply the provisions of Neb. Rev. Stat. § 57-1303, which states:

No investor-owned natural gas utility or metropolitan utilities district may extend or enlarge its natural gas service area or extend or enlarge its natural gas mains or natural gas services unless it is in the public interest to do so. In determining whether or not an extension is in the public interest, the district or the utility shall consider the following:

- (1) The economic feasibility of the extension or enlargement;
- (2) The impact the enlargement will have on the existing and future natural gas ratepayers of the metropolitan utilities district or the investor-owned natural gas utility;
- (3) Whether the extension or enlargement contributes to the orderly development of natural gas utility infrastructure;
- (4) Whether the extension or enlargement will result in duplicative or redundant natural gas utility infrastructure; and
- (5) Whether the extension or enlargement is applied in a nondiscriminatory matter.

Applying the public interest criteria of § 57-1303 to M.U.D.'s proposed natural gas main extensions reveals that the natural gas main extensions are not in the public interest. Indeed, the evidence shows that M.U.D. conducted very limited, if any, analysis of the proposed natural gas mains under the public interest criteria.

1) The economic feasibility of the natural gas main extension or enlargement.

M.U.D. conducted no economic feasibility analysis regarding the natural gas main extensions at issue in this proceeding. (Ex. 13 at 6). M.U.D.'s justification for its failure to perform such an analysis was that Northern, pursuant to the 2002 Settlement, provided \$4,350,000 to M.U.D., which M.U.D. decided to use on this project.¹ (*Id.*). M.U.D.'s failure to conduct an economic feasibility analysis is contrary to both the provisions of Neb. Rev. Stat. § 14-2117, which prohibits M.U.D. from extending or enlarging its service area unless it is economically feasible to do so, and those of Neb. Rev. Stat. § 57-1303. In fact, M.U.D. stated in its Answers to Interrogatories that an economic feasibility analysis was not required, and Scott Keep directed Rhonda Chantry not to include the mains in Highway 50 and Fairview Road² in her annual review. (Ex. 13 at 6, Tr. at

¹ As pointed out, M.U.D. was required to repay up to \$500,000 leaving only \$3,850,000 as a cash payment.

² The mains considered in Application No. P-0004 were included in prior annual reviews performed by Ms. Chantry. (Stipulation at ¶ 22).

21:25-22:9). The "ballpark" undocumented economic feasibility analysis performed by Ms. Chantry following her deposition in this proceeding did not take into account the fact that M.U.D. would have to pay Northern up to \$500,000 for the TBS. (Tr. at 38:1-17). Moreover, in its answer to an interrogatory regarding what analysis was performed regarding the impact of the mains on ratepayers, M.U.D. repeated its earlier response that no economic feasibility analysis was required. (Ex. 13 at 10). In focusing solely on economic feasibility (which was not performed), M.U.D. fails to recognize that impact on ratepayers is a different criterion that requires analyzing the impact on ratepayers of both M.U.D. and Aquila.

M.U.D. provided no evidence regarding any analysis of economic feasibility that included the fact that Northern is seeking to recover the CIAC in its rates. If Northern is successful, M.U.D. will be repaying a portion of the CIAC through the rates it pays to Northern. (Tr. at 34:3-12). The Commission, recognizing the errors and omissions of Ms. Chantry's belated "ballpark" analysis, gives it no weight here. In any event, given the extreme tardiness of Ms. Chantry's supposed economic feasibility analysis, M.U.D. could not have relied upon its results in making decisions regarding the TBS and associated mains. In addition, while M.U.D. has admitted that the 174th and Fairview TBS is designed for future growth, M.U.D. provided no projection of revenues from future customers in the area. No reliable or verifiable evidence of an economic feasibility analysis was presented to the Commission. M.U.D. has failed to demonstrate to the Commission that the mains at issue here are economically feasible.

Moreover, the contribution of funds from Northern does not absolve M.U.D. of its statutory responsibility to assure that M.U.D. spend its dollars in a reasonable and prudent manner. See Neb. Rev. Stat. § 14-2117. Pursuant to the 2002 Settlement, Northern agreed to contribute funds to M.U.D. for construction of facilities on its distribution system to assist in the development of natural gas facilities. (Ex. 2). The contribution of funds was not tied to the location of a TBS at 174th and Fairview but was instead in settlement of a contract dispute between Northern and M.U.D. (Ex. 2, Ex. 5). As previously discussed, M.U.D. sacrificed \$2.8 million in value when, in order to avoid FERC approval, M.U.D. agreed to accept a \$4.35 million CIAC and to return up to \$500,000 to Northern for a new TBS. (Ex. 5 at 3, see *supra* at 6-9). M.U.D. could spend the CIAC "for construction of facilities on its distribution system to assist in the development of natural gas facilities." (Ex.

2). Clearly, the CIAC could have been used to upgrade M.U.D.'s facilities within the city of Omaha, address existing pressure problems in the northwest area of M.U.D.'s system, and otherwise improve M.U.D.'s service in Omaha.

M.U.D.'s argument that the mains at issue are being paid for by the contribution from Northern asks the Commission to accept the fallacy that M.U.D. is receiving the \$4,350,000 without cost to M.U.D. First, M.U.D. is contractually obligated to support the inclusion of the \$4,350,000 in Northern's rates in Northern's pending rate case. Accepting Ms. Chantry's testimony that M.U.D. will have to pay 4.4 percent of that figure, M.U.D. must pay \$191,400 in its rates to Northern. The estimated cost of the mains in Highway 50 south of Prairie Corners and in Fairview Road is \$1,475,000. (Stipulation at ¶ 20, Stipulation at ¶ 6). In order to settle its contract dispute with Northern and avoid the requirement of FERC approval, M.U.D. gave up its contractual entitlement to \$2.8 million in the form of cash, assets, and services to be performed by Northern. As shown, the real costs of the TBS and associated mains to M.U.D. ratepayers total \$4,411,650.00:

Amount received as CIAC from Northern (Ex. 2)	\$4,350,000.00
Amount M.U.D. agreed to pay for TBS (Ex. 3)	(500,000.00)
M.U.D.'s share of CIAC to repay to Northern (Tr. at 238:24-239:9)	(191,400.00)
Estimated cost of mains to reach the TBS	
<ul style="list-style-type: none"> Mains in Highway 50 from south of Prairie Corners to Highway 370 (Stipulation at ¶ 6) 	(110,250.00)
<ul style="list-style-type: none"> Mains in Highway 50 from Highway 370 to Fairview Road and in Fairview Road to 174th Street (Stipulation at ¶ 20) 	(1,340,000.00)
<ul style="list-style-type: none"> Total cost of mains 	(1,450,250.00)

Contractual entitlements under 1996 Amendment given up	
• Difference between \$5,000,000 and 4,350,000	(650,000.00)
• TBS at \$500,000 cost to Northern (Ex. 5)	(500,000.00)
• Dismantling of 84th and Center TBS at \$200,000 cost to Northern (Ex. 5)	(200,000.00)
• Transfer to M.U.D. of Omaha #2 Branchline (Ex. 5)	(\$920,000.00)
• Total entitlements	(2,270,000.00)
Deficit	(\$61,650.00)

M.U.D. has a continuing obligation to its ratepayers to analyze whether or not proposed construction was economically feasible. M.U.D. has simply made no showing that the proposed natural gas main extensions to reach the 174th and Fairview TBS are economically feasible.

2) The impact the enlargement will have on the existing and future natural gas ratepayers of the metropolitan utilities district or the investor-owned natural gas utility.

M.U.D. has made no showing that any analysis was performed regarding the impact the natural gas main extensions will have on either M.U.D. or Aquila ratepayers. There was a notable lack of evidence regarding the costs and benefits of other alternatives to placing the TBS at 174th and Fairview Road. The Commission is simply without means to evaluate M.U.D.'s assertion that 174th and Fairview Road was the best location for the new TBS.

The evidence that was presented showed that M.U.D. has acknowledged that the 174th and Fairview TBS is for growth but that M.U.D. has no idea when the growth may occur. (Tr. at 85:22-86:9, 111:25-112:13). The growth is not expected to occur within the next five years. (Tr. at 116:19-117:5). M.U.D. has already spent \$110,250 on main in Highway 50 south of Prairie Corners to Highway 370 and is planning a current expenditure of \$1.72 million that could alternatively be used for projects that will have a near-term benefit to M.U.D. ratepayers. (Stipulation at ¶ 6, Stipulation at 20, Ex. 2). Instead, M.U.D. ratepayers will be supporting an expenditure of funds on facilities

that will be significantly underutilized for the foreseeable future. M.U.D. has already agreed to pay Northern as much as \$500,000 for a TBS that is not planned to be connected to M.U.D.'s system until sometime in 2004. (Ex. 3, Stipulation at ¶ 19, Ex. 13 at 15).

Moreover, M.U.D. promised in a contract with Northern to support the inclusion of the \$4.35 million CIAC in Northern's rate base. (Ex. 2, Tr. at 238:14-23). If Northern is successful in gaining approval of the inclusion of the CIAC in its rates, all Northern's ratepayers, including M.U.D. and Aquila, will be required to pay it back. (Tr. at 238:24-239:24). In addition, Northern will be paid the cost of the TBS twice, because M.U.D. will submit payment to Northern using funds from the CIAC and Northern will recover the entire CIAC from its ratepayers, including Aquila. (Tr. at 64:22-65:18, 230:18-231:19). The Commission also cannot ignore the fact that M.U.D. agreed to give up \$2.8 million in value when it entered the 2002 Settlement with Northern so that M.U.D. could go forward with this project by attempting to circumvent rather than satisfy the conditions the Commission laid out for it. That loss in value is a verifiable loss to M.U.D. ratepayers.

Aquila has existing natural gas main in Highway 370, serves the Highway Crossing development at Highway 50 and Highway 370, and appears to be able to serve additional customers south of Highway 370 as the need arises. (Ex. 47). M.U.D. simply and admittedly did not consider Aquila's presence or the impact on Aquila's ratepayers if Aquila is unable to fully utilize its natural gas main in Highway 370. (Tr. at 97:12-98:4). In fact, when Denise Dolezal modeled M.U.D.'s 125-pound system as she envisions its growth in Sarpy County after the location of the 174th and Fairview TBS was determined, she never even looked at where Aquila's mains were located. (Tr. at 97:12-98:4).

The Commission is not swayed by the fact that the 174th and Fairview TBS has already been constructed and must be paid for by M.U.D. M.U.D. was well aware of Aquila's objections at the time construction commenced and was equally aware of the Commission's willingness to find that proposed mains are not in the public interest. In fact, M.U.D. acknowledged the Commission's willingness to order a utility to abandon main during the hearing on Aquila's Motion for Cease and Desist Order. (May 29, 2003 Tr. at 22:25-23:14). Construction of the TBS went forward at M.U.D.'s risk. Unfortunately, M.U.D. took that risk at the expense of its ratepayers.

3) Whether the extension or enlargement contributes to the orderly development of natural gas utility infrastructure.

M.U.D. did not analyze whether the proposed mains contribute to the orderly development of natural gas utility infrastructure. (Tr. at 97:12-98:4). If M.U.D. is permitted to construct its natural gas main in Highway 50 and Fairview Road at this time, the Commission will be faced with proceeding after proceeding in the future as M.U.D. and Aquila battle for customers in the area. The requirement for orderly development of natural gas utility infrastructure is meant to avoid the disputes between utilities as they grow their systems. M.U.D. has already forecast its intent to serve customers off the Highway 50 and Fairview Road mains. In the Commission's view, M.U.D.'s installation of natural gas main to connect to the 174th and Fairview TBS at this time is an effort to create public interest for any future proceedings.

M.U.D. has not shown that its mains contribute to the orderly development of natural gas infrastructure as a whole or that any analysis of the proposed mains was conducted in that regard. M.U.D. decided it wanted to locate a new TBS at 174th and Fairview, asserting that such a TBS would ease the burden on the 84th and Center TBS and flow gas to the southwest portion of M.U.D.'s distribution system. (Tr. at 99:21-24, Ex. 13 at 15). Even though M.U.D. had the capability of modeling its 125-pound system, M.U.D. did not analyze or model whether 174th and Fairview was the best location for a new TBS. (Tr. at 89:9-90:5, 91:17-92:2). M.U.D. did not even analyze or model whether a TBS at 174th and Fairview would actually flow gas to the areas it defined as the "southwest portion" of its distribution system, relying instead on "gut feel" as to how their system flowed and at least in part on a "wild guess" as to the proper size for the 174th and Fairview TBS. (Ex. 16, Ex. 19, Ex. 20, Tr. at 79:18-80:3, Tr. at 89:14-90:5, Tr. at 91:17-92:2, Tr. at 161:8-163:1). Not until after M.U.D. had already decided that it wanted the TBS to be located at 174th and Fairview did M.U.D. construct some models. (Tr. at 81:4-12). Even those models were not used to evaluate whether the new TBS would serve the function of bolstering the southwest portion of M.U.D.'s service area but were instead various scenarios regarding M.U.D.'s "wish list" for future main. (Tr. at 93:11-96:14).

Using information provided by M.U.D. in this proceeding, Aquila ran models of M.U.D.'s 125-pound system to analyze whether M.U.D.'s proffered justifications for the 174th and Fairview TBS were valid. M.U.D. asserts that pressures need

bolstering when those pressures fall below 100 pounds. (Tr. at 127:13-24). M.U.D. also asserts that it wants velocities to remain below 40 feet per second. (Tr. at 124:5-16). M.U.D. presented no evidence to establish that the 174th and Fairview TBS alleviates any alleged pressure or velocity problems on M.U.D.'s system. M.U.D.'s own models do not establish any pressure or velocity problems in the areas identified as the southwest portion of M.U.D.'s service area. (Ex. 40, Ex. 16, Ex. 19, Ex. 20). Moreover, the design of M.U.D.'s system renders *impossible* the movement of natural gas from the 174th and Fairview to areas identified by M.U.D. as those meant to be bolstered by the new TBS. (Ex. 16, Ex. 19, Ex. 20, Tr. at 268:14-270:5). The bottleneck in Highway 50 prevents more than a trickle of gas from flowing into M.U.D.'s Omaha system from the 174th and Fairview TBS. (Tr. at 268:14-270:5). Consequently, the 174th and Fairview TBS has a very localized effect, contrary to M.U.D.'s asserted purpose. (Tr. at 266:25-267:9).

The Commission has stated that this criterion requires a natural gas utility to consider the orderly development of natural gas utility infrastructure as a whole rather than only that of its own system. (Order on Application No. P-0005 at 9). M.U.D. has failed even to analyze whether the 174th and Fairview TBS and the proposed natural gas main extensions to reach the TBS make sense for M.U.D.'s own system. The 174th and Fairview TBS and proposed associated mains will accomplish positioning M.U.D. for growth, but little else. Moreover, Exhibit 25 reflects M.U.D.'s wish list for future mains based on the 174th and Fairview TBS. It appears clear that M.U.D. intends to use the 174th and Fairview TBS as a springboard for extension in Sarpy County, ultimately surrounding Aquila's natural gas infrastructure. (Ex. 25, Ex. 50).

M.U.D. asserted repeatedly that the 174th and Fairview TBS is required to replace capacity lost as a result of the pressure reduction at the 84th and Center TBS, indicating that the lost capacity put a southwest TBS "on the fast track" because it was needed to make up the lost capacity. (Tr. at 177:3-9, Ex. 13). However, M.U.D.'s arguments regarding the urgent need for a TBS to make up the lost capacity are deflated by testimony of its own witnesses. M.U.D. currently has a firm entitlement with Northern for 189,500 MMBtu/day, which means Northern is obligated to deliver that amount of natural gas to M.U.D. (Tr. at 48:17-49:6). The firm entitlement was the same before the realignment of capacity from 84th and Center, and M.U.D. does not currently plan to increase the firm entitlement after the 174th and Fairview TBS is connected to its system. (Tr. at

117:6-13). M.U.D. simply has no present need for more than the 189,500 MMBtu/day that Northern is already contractually obligated to provide.

In addition, M.U.D.'s application to Northern for the TBS projected use of 9,600 MMBtu/day in the first year of operation of the TBS. (Ex. 18). Because of the inherent limitations on the ability of M.U.D.'s system to take that much natural gas away from the 174th and Fairview TBS, the 174th and Fairview TBS will only flow from one-third to one-half of that amount. (Tr. at 260:8-25, Ex. 54, Tr. at 262:2-263:11). M.U.D.'s application requested capacity of 32,000 MMBtu/day in year five, but M.U.D. states that they are not obligated to take that much gas from Northern in year five and does not believe that they will need that much gas. (Ex. 18, Tr. at 116:19-117:5). M.U.D. concedes that the 174th and Fairview TBS was designed to serve growth in the area, and the TBS provides little more than a vehicle for pioneering for future growth to M.U.D.'s system. (Tr. at 85:18-21, Tr. 111:25-112:13). However, M.U.D. does not know how long it will take for the area to develop. (Tr. at 85:22-86:9).

M.U.D.'s proposal runs afoul of the Commission's order in Application No. P-0002. In Application No. P-0002, the Commission was concerned that the analysis performed by Aquila, then Peoples, regarding natural gas main extension was insufficient when one considers the immediate costs associated with extending the main to service only four customers. (Application No. P-0002 Order at 9). The Commission stated:

In the future, the Commission expects a more definitive analysis and will strongly consider abandonment of a pipeline should such an analysis fail to adequately support current construction.

Given the capital expenditures involved and the uncertainty of future land development, the Commission believes that both M.U.D. and [Aquila] should consider coordinating service area expansions as the preferred method for developing natural gas utility infrastructure. Proposed expansions should only occur when development has occurred or when there is a reasonable expectation that development will occur in the near future. The fact that an area "may" develop in the years to come does not necessarily justify the immediate placement of natural gas infrastructure.

(Application No. P-0002 Order at 9).

The natural gas infrastructure that this Commission is being asked to consider is not being constructed based on present need for system integrity or for service to customers. M.U.D. anticipates that this area will eventually replicate the development that has occurred around 175th and Center, with commercial, industrial, and residential developments, but does not know how long it will take for the area to develop. (Tr. at 85:18-86:9). Consistent with the Commission's earlier order, M.U.D.'s mains are unjustified.

4) Whether the extension or enlargement will result in duplicative or redundant natural gas utility infrastructure.

As discussed above, Aquila has existing natural gas main in Highway 370, serves the Highway Crossing development at Highway 50 and Highway 370, and plans to serve additional customers south of Highway 370 as the need arises. M.U.D. did not consider Aquila's presence in deciding on its proposed natural gas main extensions. (Tr. at 97:12-98:4). M.U.D. recognizes that its extension of the proposed natural gas mains will result in additional disputes over who is entitled to serve growth south of Highway 370. (Tr. at 15:23-16:11). Aquila is positioned to serve customers and M.U.D. is trying to "leapfrog" over Aquila to claim uncertain future growth in the area.

In Application No. P-0003, the Commission stated that "redundant" means "exceeding what is necessary or normal: superfluous." (Application No. P-0003 Order at 9). M.U.D. has repeatedly asserted that the 174th and Fairview TBS is needed because of the loss of capacity at the 84th and Center TBS resulting from Northern's reduction of pressure. (Ex. 13, Tr. at 177:3-9). M.U.D. also argues that the 174th and Fairview TBS is necessary for reinforcement of the southwest portion of M.U.D.'s service area, but models prepared from M.U.D.'s data demonstrate that natural gas from the 174th and Fairview TBS simply cannot reach what M.U.D. defined as the southwest portion of its service area in meaningful volumes. (Ex. 13, Ex. 16, Ex. 19, Ex. 20, Ex. 43, Tr. at 264:18-266:24) The fact that the 174th and Fairview TBS cannot serve one of the primary purposes M.U.D. asserts is behind it weighs against finding that it and the mains necessary to connect to it are "necessary." M.U.D.'s assertion of need for the 174th and Fairview TBS to replace lost capacity also rings hollow in light of testimony by its witnesses that M.U.D. anticipates no increase in the total amount of gas M.U.D. will take from Northern in the foreseeable future. (Tr. at 117:6-13). M.U.D. has shown no present need for the 174th and Fairview TBS and associated mains. The Commission

thus finds that the 174th and Fairview TBS and the associated mains "exceed what is necessary" and are, therefore, redundant.

5) Whether the extension or enlargement is applied in a nondiscriminatory manner.

In essence, M.U.D. plans to invest its ratepayers' money to support natural gas infrastructure to serve future growth, which may never materialize. As explained in detail in previous proceedings before this Commission, the difference between a GC main (a supposed system improvement main) and a GCP main (a pioneer approach main installed at developer request) is that a developer requesting a main installed in a GCP context must pay M.U.D. for the difference between any projected revenues and the cost of the main. (Ex. B to Stipulation at 2). Because M.U.D. did not run an economic feasibility analysis, there is no way to determine what the cost deficiency is for customers M.U.D. readily admits it will serve once the mains are in place. This reasoning is per se discriminatory to developers who must make payments. It is also discriminatory to ratepayers in M.U.D.'s existing system who would be forced to subsidize this proposed facility.

Business Judgment Rule

M.U.D. has proposed to the Commission that the Commission apply the business judgment rule that says the decision made by a duly elected board of directors cannot be second-guessed by a court in the absence of fraud or abuse. First, the business judgment rule usually comes into play where someone seeks to hold a director personally liable for damages resulting from a corporate transaction. 18B AM. JUR. 2D Corporations § 1703 (1985). This is not such a situation. Second, the Nebraska Legislature established a statutory framework that explicitly permits the Commission to evaluate whether a natural gas utility is extending its natural gas system in the public interest. The Legislature did not provide any safe harbor for extensions made that were approved by a board of directors.

C O N C L U S I O N

In summary, the Commission finds that the M.U.D. mains in Highway 50 south of Prairie Corners and in Fairview Road from Highway 50 to 174th Street are not in the public interest. The Commission recognizes M.U.D.'s assertion that it has lost TBS capacity as a result of the pressure reduction at 84th and Center. M.U.D. is not prohibited by this order from connecting

its existing system to a new TBS. The Commission suggests that, after analysis of what location for a new TBS best serves the needs of M.U.D.'s system, M.U.D. communicate its proposed location to Aquila. If Aquila disagrees with the location, Aquila can bring a proceeding before this Commission. Clearly, Aquila has no objection to M.U.D.'s construction of a TBS north of Harrison Street. The Commission strongly urges M.U.D. to carefully consider whether to commence construction of those future facilities until disputes regarding their public interest status have been resolved.

O R D E R

In consideration of the evidence adduced at hearing and summarized above, the Commission is of the opinion and finds that:

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that M.U.D.'s natural gas main extensions in Highway 50 south of Highway 370 to Fairview Road and in Fairview Road to 174th Street are not in the public interest.

IT IS FURTHER ORDERED that M.U.D. must cease and desist from additional construction in Highway 50 south of Highway 370 to Fairview Road and in Fairview Road to 174th Street.

MADE AND ENTERED at Lincoln, Nebraska this 13th day of November, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Deputy Director